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No. 74-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

STEPHEN A. BODZIN and TANYA K. BODZIN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Press of Byron S. Adams Printing, Inc., Washington, D. C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stephen A. Bodzin and Tanya K. Bodzin, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Appendix A, *infra,* pp. 1a-13a) are reported at 60 T.C. 820. The opinion of the Court of Appeals (Appendix B, *infra,* pp. 14a-18a) is reported at 509 F.2d 679 (1975).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1975 (Appendix B, *infra,* p. 14a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the expenses of maintaining an office in petitioners' home in which petitioner Stephen A. Bodzin performed part of his duties as an employee constitute ordinary and necessary business expenses deductible under Section 162(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 [Sections 162(a) and 262] and the Treasury Regulations on Income Tax pertaining to these provisions are set forth in Appendix C, *infra*, p. 19a.

STATEMENT OF THE CASE

The facts are undisputed, and are presented here substantially as found by the Tax Court below (Appendix A).

Throughout 1967, petitioner[1] was employed as an attorney-adviser in the Interpretative Division, Office of the Chief Counsel, Internal Revenue Service. The primary function of the Interpretative Division is to provide legal advice to the Commissioner of Internal Revenue.

Petitioner worked primarily on proposed ruling letters and published rulings, requests from the Assistant Commissioner (Technical) for technical advice, and requests from other divisions within the Office of Chief

[1] Mrs. Bodzin is a party to this action only because joint returns were filed; Stephen A. Bodzin will hereinafter be referred to as "petitioner."

Counsel for opinions with regard to particular tax law problems. In general, his work involved review, analysis, research and opinion writing. Petitioner generally worked independently, without day-to-day supervision, receiving guidance only when requested or when guidance was deemed necessary.

It was not the policy of the Interpretative Division to request its attorneys to work overtime. Accordingly, petitioner was not required, requested, expected, or encouraged to work after normal working hours (9 a.m. to 5:30 p.m.), nor was he given additional compensation for doing so. He was, however, expected to complete his work with reasonable promptness.

Nevertheless, petitioner's duties and responsibilities were of such a nature that he frequently deemed it desirable to work overtime in order to meet deadlines, self-imposed or otherwise, and to insure that work was performed to the best of his abilities. In addition, he used evenings and weekends to read widely about current developments in the tax law.

Petitioner was provided an office in the Internal Revenue Building in downtown Washington, D.C. That office was open, and heated or air-conditioned in the evenings and over the weekends and on holidays.

During 1967 the petitioner, his wife and one child lived in an apartment in Alexandria, Virginia, approximately 10 miles from the Internal Revenue Building. The apartment contained six rooms, including a separate study or den. The study, which was approximately 8 feet by 12 feet, was furnished with office furniture, book cases, cabinets and lamps. The room was not used when entertaining visitors and was generally not used by anyone except the petitioner. Petitioner used the

study as his home office and for occasional non-business purposes, such as stamp collecting activities, reconciliation of monthly bank statements and payment of bills.

Petitioner usually worked in his home office two or three evenings during the week and for 3 to 5 hours on weekends. He worked on cases and other matters assigned to him and read about recent developments. With respect to his cases, he sometimes relied on reference materials of his own stored in the study and sometimes on materials that he had photocopied and brought home. He frequently worked on first drafts of memoranda in his home office. He also used the office to prepare for conferences.

Petitioner worked after regular working hours in his home office rather than returning to his office in the Internal Revenue Building because it was more convenient to do so and because he thought it was more efficient. Also, working in the home office in the evening enabled petitioner to make better use of his car pool and to spend more time with his family.

Petitioners paid a total of $2,100 in rent for their apartment in 1967. Petitioner determined that $100 of this amount was allocable to the use of the study as a home office; accordingly, petitioners deducted $100 as "business expenses deductible under sec. 162,"[2] an itemized miscellaneous deduction on their 1967 return. The Commissioner of Internal Revenue disallowed the claimed deduction.

In a reviewed opinion, the Tax Court determined that petitioner's use of his home office was appropriate

[2] All statutory references are to the Internal Revenue Code of 1954.

and helpful to the performance of his duties as an attorney for the Internal Revenue Service, and held (with four dissents) that the expenses of maintaining the home office fall within Section 162 and outside Section 262.

The Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court, concluding that the expense in question was a personal expense within the meaning of Section 262 and not a business expense. The Court of Appeals expressly determined that it was unnecessary to decide whether the expense of maintaining the home office was appropriate and helpful in carrying on the petitioner's business.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the earlier decisions of the Court of Appeals for the Second Circuit in *Newi* v. *Commissioner,* 432 F.2d 998 (1970) and the Court of Appeals for the Eighth Circuit in *Dietrich* v. *Commissioner,* 503 F.2d 1379 (1974), as well as numerous decisions of the Tax Court, and only this Court can resolve the conflict.

The taxpayer in the *Newi* case was employed as a salesman of television time for the American Broadcasting Company ("ABC") television network. Newi maintained a study-office in his apartment in Manhattan, cross town from his regular office. The Tax Court [3] found that Newi regularly worked in his study-office "reviewing his notes on the day's selling activities, studying various research materials and ratings, making his plans for the next day's work, and viewing the television advertisements of ABC and its competitor

[3] *George H. Newi,* T. C. Memo. 1969-131, 28 T.C.M. 686.

networks." The Tax Court further found that the "study was not used by [taxpayer] or his wife for personal entertaining or personal television viewing."

The Tax Court in *Newi* determined that the proper standard to be applied in determining whether the expenses of maintaining the study were "ordinary and necessary" within the meaning of Section 162 was that laid down by this Court in *Welch* v. *Helvering,* 290 U.S. 111, 113 and *Commissioner* v. *Tellier,* 383 U.S. 687, 689 (1966), *i.e.,* whether the contested expenditure was "appropriate and helpful" to the conduct of the taxpayer's business. Applying that standard, the Tax Court held the expenses relating to Newi's study were deductible as ordinary and necessary business expenses.

In affirming the decision of the Tax Court in *Newi,* the United States Court of Appeals for the Second Circuit focused upon the fact that it would have been highly inconvenient for the taxpayer to return to his office after dinner and upon the further fact that his study-office constituted an ideal place for the type of work that he performed there. It made no difference to the Court of Appeals for the Second Circuit that the ABC Building was open in the evening with office space and television equipment available for Newi's use.

It is respectfully submitted that *Newi* cannot be distinguished from this case in any meaningful way. Except for the fact that Newi was employed by ABC as a television advertising salesman while petitioner was employed by the Internal Revenue Service as an attorney, the facts in the two cases are practically identical.

In *Dietrich* v. *Commissioner, supra,* the taxpayers were a husband and wife, both of whom were employed

during the year in issue; the husband as a resident physician and the wife as a registered nurse and instructor. They had an office in the basement of their home which was used by Dr. Dietrich in preparing and grading lessons in connection with his teaching duties, to keep up with his medical reading, and to treat an occasional patient. Mrs. Dietrich used the office for professional reading and for grading papers. The office was also used occasionally for nonbusiness purposes, such as paying personal bills. The Dietrich's were not required by their respective employers to have an office at home, but, as the Tax Court [4] stated, "they found the office to be the most convenient place for efficiently accomplishing some of their work." Dr. Dietrich had no office nor any period of uninterrupted time for accomplishing the work he did at home at the various hospitals at which he was employed.

The Tax Court found that the Dietrich's home office was "appropriate and helpful" in performing their respective duties, and held that they were entitled to deduct the expenses relating thereto. The Court of Appeals for the Eighth Circuit affirmed in a *per curiam* decision.

In numerous other cases, both prior and subsequent to the decision of the Second Circuit in *Newi*, the Tax Court has held the expenses of maintaining a home office to be "appropriate and helpful" to the conduct of a taxpayer's business as an employee, and therefore deductible business expenses. *Herman Bischoff*, T. C. Memo. 1966-102, 25 T.C.M. 538; *Stanley E. Bailey*, T. C. Memo. 1971-107, 30 T.C.M. 460; *Christopher A. Rafferty*, T. C. Memo. 1971-203, 30 T.C.M. 848; *James L.*

[4] *Marvin L. Dietrich*, T. C. Memo. 1971-159, 30 T.C.M. 685.

Denison, T. C. Memo. 1971-249, 30 T.C.M. 1074; *Richard Keith Johnson,* T. C. Memo. 1972-192, 31 T.C.M. 941; and *LeRoy W. Gillis,* T. C. Memo. 1973-96, 32 T.C.M. 429.

In this case, the Court of Appeals for the Fourth Circuit concluded that the expense of renting petitioners' apartment was a personal expense within the meaning of Section 262 and that "[I]t is, therefore, unnecessary to decide whether it was appropriate and helpful in carrying on his business." The Fourth Circuit's rejection of the "appropriate and helpful" standard for determining whether the portion of the petitioners' rental attributable to the home-office was a business expense within the meaning of Section 162 places it in conflict with the decision of the Second Circuit in *Newi* and the Eighth Circuit in *Dietrich.* The writ should be granted because only this Court can resolve that conflict.

2. The question presented in this case is of general importance in the administration of the Federal income tax laws. That question is being widely litigated, and will continue to be so litigated until it is authoritatively settled by this Court. The issue involved is of importance to many taxpayers who are employees and independently do employment-related work in an office they maintain at home.

The Commissioner of Internal Revenue has recognized that certain taxpayers who are employees and maintain an office in their home are entitled to deduct the costs of maintaining that office as ordinary and necessary business expenses. This was done in Rev. Rul. 62-180, 1962-2 Cum. Bull. 52, which holds that "An employee who, as a condition of his employment, is required to provide his own space and facilities for

performance of his duties and regularly uses a portion of his personal residence for that purpose may deduct a pro rata portion of the expenses of maintenance and depreciation on his residence." The Tax Court and two Courts of Appeals have rejected the standard for deductibility of home office expenses set forth in Rev. Rul. 62-180. Moreover, both administratively and in litigation, the Internal Revenue Service has deviated from Rev. Rul. 62-180 and has conceded the deductibility of home office expenses in situations clearly falling outside the rule of the Revenue Ruling. *Thomas J. Green, Jr.*, 59 T.C. 456 (1972).

Presently, there is uneven administrative treatment throughout the United States. In general, the amounts of deductions are not large; and in those situations where deductions are being denied most taxpayers cannot afford the cost to pursue the administrative and judicial remedies available to them. The conflict among the circuits on this issue can only stimulate additional disputes, and in all likelihood, most taxpayers will not find it worth their while to pursue their legal remedies. In this connection, the conflicts could well extend to other types of employee expenses (*e.g.*, special clothing, educational expenses, business meals) unless the conflict as to the applicable standard for distinguishing business from personal expenses is resolved. This Court should therefore resolve the clear conflict among the circuits and put the issue to rest.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

60 T. C. No. 86

UNITED STATES TAX COURT

STEPHEN A. BODZIN and TANYA K. BODZIN, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 1104-71 Filed September 4, 1973.

In 1967 the petitioner-husband was a Government attorney. In connection with his business he found it helpful to maintain a small office in his apartment. There, in the evenings and on weekends, he frequently worked on his cases and studied current legal developments. The maintenance of his home office was not required by his employer; nor was it, in a strict sense, required by the nature of his employment. But it was directly and closely related to his business. His employer provided office facilities, and these facilities were available to petitioner at all times—evenings and weekends included. Petitioner lived approximately 20 to 30 minutes by car from his employer's offices. His use of the home office to some extent served his own convenience, but it was also more efficient.

Held, petitioner is entitled to deduct the reasonable, actual cost of his home office as an ordinary and necessary business expense under section 162, I.R.C. 1954.

John J. Murow, for the petitioners.

Steven G. Goldstein and *Robert S. Erickson,* for the respondent.

DAWSON, *Judge:* Respondent determined a deficiency in petitioners' Federal income tax for the year 1967 in the amount of $87.78. The only issue presented for our decision is whether petitioner Stephen A. Bodzin is entitled to deduct a portion of the cost of one room in his apartment as a business expense because of the use of the room

as a home office. The issue is argued within the context of sections 162 and 262, Internal Revenue Code of 1954.[1]

Findings of Fact

Some of the facts have been stipulated. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Stephen A. Bodzin and Tanya K. Bodzin (the petitioners herein) are husband and wife whose legal residence was in Alexandria, Virginia, when they filed their petition in this proceeding. They filed their joint Federal income tax return for taxable year 1967 with the district director of internal revenue at Richmond, Virginia.

During the entire year 1967 Stephen A. Bodzin (hereinafter referred to individually as petitioner) was employed as an attorney-adviser in the Interpretative Division, Office of the Chief Counsel, Internal Revenue Service. The Interpretative Division prepares legal opinions for the guidance of officials and employees of the Internal Revenue Service; reviews rulings or opinions referred to the Office of Chief Counsel by the Office of the Assistant Commissioner (Technical); reviews or assists in preparing mimeographs and press releases when referred to the Chief Counsel's Office for consideration; reviews and edits revenue rulings which are to be published; reviews closing agreements; and assists in maintaining digests of the opinions of the Chief Counsel. In short, the primary function of the Interpretative Division is to be a lawyer for the Commissioner of Internal Revenue. The work of the Interpretative Division has an appreciable effect on the interpretation and administration of the Federal tax laws.

Petitioner's duties as an attorney-adviser included the following. He worked on proposed ruling letters and pub-

[1] All statutory references are to the Internal Revenue Code of 1954, as amended.

lished rulings, requests for technical advice referred to the Office of Chief Counsel by the Assistant Commissioner (Technical), and requests from other divisions within the Office of Chief Counsel for an opinion with regard to particular tax law problems. Although petitioner had been employed for only 6 months at the beginning of 1967 and his relative inexperience was at first taken into consideration by his supervisors, he was assigned a wide variety of important and complex legal problems. When assigned a problem he would first read and review the request and administrative files and proceed to analyze the facts and issues involved. Next he would research the problem extensively, using the references available in his own office area, the Chief Counsel's library, the Interpretative Division Digest Section, and such other sources as were available to him. He also conferred with others, such as reviewers, officials of the Service, and taxpayers' attorneys, to obtain their views and additional information. At the conclusion of all this, the petitioner would ordinarily draft a proposed memorandum—sometimes called a General Counsel Memorandum or G.C.M.—containing his final judgment of the problem. He might make several drafts of a G.C.M. before producing one that he was satisfied with. A proposed G.C.M. was reviewed carefully and thoroughly by his supervisors. Sometimes the petitioner would also prepare a "side memorandum" to accompany his draft of the G.C.M.

The duties of an attorney in the petitioner's position required mature judgment and an ability to apportion one's own time and workload. Petitioner generally worked independently, without day-to-day supervision, receiving guidance only when requested or when guidance was deemed necessary.

It was the policy of the Interpretative Division to complete its cases as expeditiously as possible, the quality of the work performed on each case being emphasized above

all else. No specific number of cases was required to be completed at the end of a given week or month. Attorney Production Reports were, however, required. Each week the petitioner filled out one such report showing the number of cases disposed of in the preceding week, the number of cases on hand, and the number of 60-day cases and expedite cases on his docket. The report also listed the date on which each case was received by him, the date on which he expected to begin work on the case, the date on which he actually began work on the case, and the target date by which he expected to finish the case. Petitioner was given the responsibility of setting his own target dates. They were suppose to be realistic ones. However, he could, and often did, extend them. So-called "expedite" cases were to be completed within a short period of time. Though rare, petitioner did receive and work on some expedite cases.

It was not the policy of the Interpretative Division to request its attorneys to work overtime. Accordingly, petitioner was not required, requested, expected, or encouraged to work after normal working hours (9 a.m. to 5:30 p.m.).

Nevertheless, petitioner's duties and responsibilities were of such nature that he frequently deemed it desirable to work overtime in order to meet deadlines, self-imposed or otherwise, and to insure that work was performed to the best of his abilities. In addition, petitioner liked to use evenings and weekends to read widely about current developments in the tax law. He would spend hours reading such things as advance sheets of various Federal tax services and Tax Court opinions. Petitioner was not given any additional compensation for overtime work since his salary was regarded as covering all job-connected work regardless of the number of hours devoted thereto.

During 1967 the petitioner, his wife and one child lived in an apartment in Alexandria, Virginia, across the Poto-

mac River from Washington, D. C. The apartment consisted of a living room, dining room, kitchen, two bedrooms, two bathrooms, and a study or den. The study was a separate room, approximately 8 feet by 12 feet in size. It was furnished with a large desk, a desk chair, several book cases, several cabinets, and several lamps. The bookshelves contained, among other things, a one-year-old looseleaf tax servce, a set of Seidman's Legislative History of the Income Tax Laws, and various tax treatises and lawbooks. There was no other furniture or appliances in the room. The room was not used when entertaining visitors and was generally not used by anyone except the petitioner. He used the room as his home office.

Petitioner occasionally used the room for purposes unrelated to his business, including payment of bills, reconciliation of monthly bank statements, and stamp collecting. He stored in the room personal papers, his stamps, and his personal library. To this was added some of his wife's personal library.

Petitioner usually worked in his home office two or three evenings during the week and for 3 to 5 hours on weekends. He worked on cases and other matters assigned to him and read about recent developments. With respect to his cases, he would rely sometimes on reference materials of his own stored in the study and sometimes on materials that he had photocopied and brought home. He frequently worked on the first draft of memoranda while at home in his home office. He would often prepare for upcoming conferences while there.

During 1967 the petitioner customarily traveled the 10 miles to and from work in a car pool that left the Federal Triangle area of downtown Washington, D. C., shortly after 5:30 p.m. Therefore, whenever petitioner found it desirable to work past the normal working hours he was faced with the following three choices: (1) Go home with the car pool and return to the Internal Revenue Service

offices after dinner; (2) use public transportation or call home for a ride after working late at the Internal Revenue Service offices and eating dinner downtown, eating no dinner, or postponing dinner until arriving at home; (3) bring work home to his home office. In such situations petitioner almost invariably chose to bring the work home because it was more convenient to do so and because he thought it was more efficient. It enabled him to make better use of his car pool and to spend more time with his family.

The Internal Revenue Service offices are located at 1111 Constitution Avenue in downtown Washington, D. C. Petitioner was provided an office in that building. At all relevant times his office in the Internal Revenue building was heated and air-conditioned 7 days a week, 24 hours a day. If he had chosen to do so, the petitioner could have worked comfortably in his Internal Revenue Service office in the evenings and over weekends and holidays. The Internal Revenue building was, and is, at all times open to persons having the proper security clearance and identification. Petitioner always had both.[2]

Petitioners paid a total of $2,100 in rent for their apartment in 1967. Having determined that $100 of this amount was allocable to the use of their study as a home office, they deducted the $100 as "business expenses deductible under sec. 162"—an itemized miscellaneous deduction. Respondent disallowed the claimed deduction.

Ultimate Findings

1. Petitioner's use of his home office was appropriate and helpful to the performance of his duties as an attorney for the Internal Revenue Service.

2. Petitioner's expenses of maintaining his home office in 1967 constituted ordinary and necessary business expenses.

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[2] The record does not disclose whether the Chief Counsel's library was open after normal working hours.

OPINION

Petitioner contends that the claimed deduction is an ordinary and necessary business expense under section 162(a). Respondent, while in no way challenging the correctness of the amount involved, would disallow the deduction on the ground that the expense "was not required in order for the Petitioner to properly perform his employment duties." According to respondent, the petitioner must prove "that the nature of his duties required working after normal working hours and that his employer failed to provide him with an office that was adequate and reasonably accessible for the performance of such work." Respondent argues that the petitioner fails to establish his right to the claimed deduction when it appears that he "voluntarily chose to work after normal working hours and that he [petitioner] performed such work at home rather than at the office of his employer solely because of personal reasons." Alternatively, respondent argues that the expense incurred was an expense of his employer (the Internal Revenue Service) which petitioner voluntarily assumed; therefore, it cannot be deducted by petitioner.

With respect to his primary ground, respondent attempts to rehabilitate Rev. Rul. 62-180, 1962-2 C.B. 52, which laid down guidelines for determining the deductibility of home office expenses and for figuring the amount of such expenses. The ruling states that one requirement for deductibility is "that, as a condition of his employment, he [the taxpayer] * * * [must be] required to provide his own space and facilities for performance of some of his duties." Respondent has argued in the past that this means that the *employer*, if one exists, must *require* that the taxpayer provide his own facilities. *Newi* v. *Commissioner*, 432 F.2d 998 (C.A. 2, 1970), affirming a Memorandum Opinion of this Court. Compare *Harold A. Christensen*, 17 T.C. 1456 (1952), (promotion and entertainment expenses paid by a drug company field manager); *John J. Ide*, 43 B.T.A.

799 (1941), (travel and entertainment expenses paid by a Government employee); *David J. Primuth*, 54 T.C. 374 (1970), (employment agency business). This argument has been previously rejected. *Newi* v. *Commissioner, supra.*[3] Respondent now hastens to point out that, although parts of the ruling are misleading, "the examples set forth in Rev. Rul. 62-180, *supra*, make it clear that the term 'required as a condition of employment' means required in order to properly perform the employment duties." We think this approach is also unsatisfactory in that "required" can be interpreted strictly as meaning "absolutely essential" or "absolutely necessary" and such an interpretation leads to the imposition of a standard which is too strict. Therefore, we likewise reject the rehabilitated version of this ruling.

Respondent makes further use of the revenue ruling in connection with a correlative argument. He contends that "[w]here the work was done at home only as a matter of convenience in spite of adequate office facilities, the deduction is properly disallowed." This argument is illustrated by example (4) of Rev. Rul. 62-180, *supra* at 56. The argument and the test that it seeks to establish are too broad. The test could be made to work, however, if the word "only" was emphasized, but we need not fiddle with it since a better test already exists.[4]

The applicable test for judging the deductibility of home office expenses is whether, like any other business expense, the maintenance of an office in the home is appropriate and

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[3] See also *Richard Keith Johnson*, T.C. Memo. 1972-192; *James L. Denison*, T.C. Memo. 1971-249; *Marvin L. Dietrich*, T.C. Memo. 1971-159; *Stanley E. Bailey*, T.C. Memo. 1971-107; *Christopher A. Rafferty*, T.C. Memo. 1971-203; *Herman E. Bischoff*, T.C. Memo. 1966-102.

[4] Rev. Rul. 62-180 has recently been found wanting with regard to its method of allocation. *George W. Gino*, 60 T.C. No. 37 (May 31, 1973).

helpful under all the circumstances. *Newi* v. *Commissioner, supra; LeRoy W. Gillis,* T.C. Memo. 1973-96. That the maintenance of the home office can be characterized as "a matter of convenience" due to the existence of duplicate employer-provided facilities does not void the conclusion that the expenditure is appropriate and helpful.[5] A finding that the home office was simply for the taxpayer's personal convenience would bar the deduction if the Court concluded that personal convenience was the primary reason for maintaining the office. Such a finding would displace any conclusion as to "appropriateness" and "helpfulnee." Of course, a finding of bad faith on the part of the taxpayer, i.e., that he sought only to manufacture a deduction, would also be decisive in favor of the respondent's determination.

In this case there is no question as to the good faith of the petitioner or the reasonableness of the amount. Cf. *Commissioner* v. *Heininger,* 320 U.S. 467 (1943). We have found as an ultimate fact, on this record, that the expenses at issue were directly related and pertained to his business—that of a Government attorney. It makes no differ-

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[5] See *Freda W. Sandrich,* T.C. Memo. 1946-82, Supplemental Opinion, T.C. Memo. 1946-144, where the "story preparation" expense, really a home office expense, was incurred to some extent to serve the decedent's convenience.

Lest anyone be misled about the precedential role of the case of *Harold H. Davis,* 38 T.C. 175 (1962), wherein the home office expenses of a college professor were disallowed, we repeat what we have said once before:

> That case has a strange history. The Commissioner prevailed in this Court over vigorous dissent. On appeal to the Ninth Circuit, our decision was vacated and remanded for entry of decision in accordance with the stipulation of the parties. On remand, this Court entered a decision of no deficiency. The Commissioner apparently abandoned his position. In any event, the *Davis* case must now be considered in the light of more recent opinions. [*Marvin L. Dietrich,* T.C. Memo. 1971-159.]

See generally Wolfman, "Professors and the 'Ordinary and Necessary' Business Expense," 112 U. Pa. L. Rev. 1089 (1964).

ence that the petitioner was not required to maintain a home office, that he wanted merely to do a good job, and that he liked his work. The expenses were "necessary" because they were appropriate and helpful in the conduct of his business. They enabled him to keep a facility in his home wherein he could, and did, work. See *Newi* v. *Commissioner, supra; Blackmer* v. *Commissioner*, 70 F.2d 255 (C.A. 2, 1934). They were "ordinary," and not capital, in nature. See *Welch* v. *Helvering*, 290 U.S. 111 (1933); *Commissioner* v. *Tellier*, 383 U.S. 687 (1966). Accordingly, we hold that the home office expenses of this petitioner fall within section 162 and outside section 262.[6]

With respect to respondent's alternative argument, it is our view that the home office expenses of the petitioner were not the responsibility of the Internal Revenue Service; that petitioner had no right to reimbursement for such expenses; and, consequently, he did not voluntarily assume them.

Reviewed by the Court.

Decision will be entered under Rule 50.

RAUM and TANNENWALD, *JJ.*, did not participate in the disposition of this case.

SCOTT, *J., dissenting:* Even though I recognize that the authorities cited in the majority opinion, particularly the memorandum opinions referred to therein, support the conclusion reached, I respectfully disagree with that conclusion since in my view the use by an employed lawyer of a part of his home for doing professional reading and some written work for his employer does not change the personal expense of rental of a home to a business expense.

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[6] For an indication that the Government is aware of the problems home office expenses present for the collection of revenue, see Proposals for Tax Change, Department of the Treasury (April 30, 1973). Obviously these problems are best dealt with by Congress.

Under the holding of the majority opinion, there would certainly be no professional person, and very few if any business people, who would not be entitled to deduct as a business expense some portion of the cost of rental of a home or the maintenance of a house since the great majority of such persons do professional reading and written work for themselves or their employers in their homes. In fact, this is probably true of the majority of persons interested in their work regardless of the type of work they do unless their work is purely mechanical in nature. In my view it was never the intent of section 162 to change the personal expenditure of a taxpayer for a home for himself and his family into a business expense merely because that taxpayer is sufficiently interested in the work in which he engages to do some work in his home.

DRENNEN and FEATHERSTON, *JJ., agree with this dissent.*

FEATHERSTON, *J., dissenting:* I respectfully dissent. Section 162(a) allows as a deduction "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." In my opinion, the rental expenses here in issue were not paid or incurred in carrying on any business. Rather, they were paid by petitioner in providing a home for himself and his family and are nondeductible "personal, living, or family expenses" under section 262.

In my view, it is beside the point that petitioner's overtime work or his use of his home office was "appropriate and helpful to the performance of his duties as an attorney for the Internal Revenue Service." That is not the issue. The question is whether the rental expenses were paid or incurred in carrying on petitioner's business. And there is nothing to show that he would not have incurred these same rental expenses (or that his rent would have been less) if he had found it more convenient to do his overtime work at the office provided and maintained for that purpose by his employer.

Surely the Commissioner would not be heard to claim petitioner received additional taxable income if he used his Internal Revenue Service office for such personal purposes as storing his golf clubs, keeping his umbrella or raincoat available for a rainy day, eating his lunch, taking personal telephone calls, etc. Such uses are merely incidental to the business use of the office. Similarly, petitioner's use of a room in his apartment for a few hours of overtime work each week is merely incidental to the purely personal purpose for which the rent was expended.

I am aware that language tending to support the majority appears in some prior opinions on home offices and that the Commissioner's action in this area has not always been consistent. But to say, as does the majority, that the applicable test for judging deductibility of home office expenses is whether "the maintenance of an office in the home is appropriate and helpful under all the circumstances" does not provide a practical guide. Indeed, in my opinion, that test confuses petitioner's personal convenience in doing overtime work with the purpose for which his rent was actually paid. Where it is not shown that rent was paid for the purpose of acquiring home office space—in addition to the rent otherwise required to obtain living quarters—the reasoning of *Fausner* v. *Commissioner*, 413 U.S. 838 (1973), clearly suggests that a deduction is not allowable under section 162(a).

DRENNEN, *J., agrees with this dissent.*

QUEALY, *J., dissenting:* Section 162 provides for the deduction of "the ordinary and necessary expenses" paid or incurred by a taxpayer in carrying on his trade or business. In my opinion, the deduction in question was neither "ordinary" nor "necessary." The petitioner was a salaried employee of the Internal Revenue Service. He was neither required, nor did his superiors expect him, to do any work at his place of residence.

This is not a situation in which the petitioner actually transacted any business from his residence. Taking his testimony at face value, the principal so-called business use of the petitioner's "study" was limited to reading up on current tax reports and keeping abreast of developments in his field, an avocation which might improve his skills, but where, when, and to what extent he engaged therein was solely a matter of personal choice and convenience. He could have done as much at the dining room table.

While the amount claimed as a deduction is hardly significant, I would regard it as the "nose of the camel." It is a common practice for lawyers, doctors, engineers, and other professionals who have any interest in attaining excellence in their profession, to read up on technical publications and other informative materials outside of their normal working hours. Such a practice hardly justifies claiming some part of the cost of the residence as a trade or business expense within the meaning of section 162. It is solely a matter of personal choice and convenience, to which I would apply the same rules which have recently been affirmed by the U.S. Supreme Court with respect to a taxpayer's expenses of driving to and from his job. See *Donald W. Fausner* v. *Commissioner*, 413 U.S. 838, (1973), affirming 472 F.2d 561 (C.A. 5, 1973). In order for such an expense to constitute an allowable deduction, I would require *as a minimum* proof on the part of the taxpayer that the space claimed to have been devoted to this purpose in the residence of the taxpayer would not have been acquired for such purpose.

DRENNEN, *J., agrees with this dissent.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1397

STEPHEN A. BODZIN and TANYA K. BODZIN, *Appellees*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Appellant*.

Appeal from the United States Tax Court.

Argued December 2, 1974 Decided January 20, 1975

Before HAYNSWORTH, *Chief Judge*, BOREMAN, *Senior Circuit Judge*, and THOMSEN, *Senior District Judge*.

Michael L. Paup, Attorney, Tax Division, Department of Justice (Scott P. Crampon, Assistant Attorney General, Meyer Rothwacks and F. Arnold Heller, Attorneys, Tax Division, Department of Justice, on brief) for Appellant; John J. Yurow (Arent, Fox, Kintner, Plotkin & Kahn, on brief), for Appellees.

THOMSEN, *Senior District Judge*

The Commissioner appeals from a decision of the Tax Court [1] which allowed taxpayers, in computing their tax-

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[1] *Bodzin* v. *Commissioner*, 60 T.C. 86, a reviewed decision, with four judges dissenting.

able income for 1967, to deduct $100 of the $2,100 annual rent they paid for their apartment, on the ground that one room therein was used on some evenings and weekends by the husband as an office.

There is no dispute about the basic facts. Bodzin was an attorney-advisor in the Interpretative Division, Office of the Chief Counsel, Internal Revenue Service. His office was in the Internal Revenue Building, in Washington, where he worked on proposed ruling letters and published rulings, requests for technical advice and opinions; he analyzed the facts and issues, did the necessary legal research, conferred with other people and prepared memoranda. He generally worked independently, without day-to-day supervision, but was expected to complete his work with reasonable promptness. He was not required, requested, expected or encouraged to work in the evenings or on weekends, but he sometimes did in order to meet deadlines, self-imposed or otherwise. If he had chosen to do so, he could have worked comfortably in his I.R.S. office at any time.

During the tax year in question, the Bodzins and their child lived in Alexandria, Virginia. Their apartment consisted of a living room, dining room, kitchen, two bedrooms and baths and an 8′ x 12′ study or den. The study was furnished with a desk, desk chair, cabinets, lamps and several bookcases, in which Bodzin and his wife kept some of their personal books, as well as some tax treatises and law books. The study was not used for entertaining visitors, but was used by the Bodzins for various non-business purposes, including Bodzin's stamp collecting activities.

Bodzin usually worked in the study two or three evenings a week and for three to five hours on weekends, reading or writing. This was more pleasant and convenient to him than remaining at or returning to his office in the Internal Revenue Building, although that building was al-

ways open, heated or air conditioned, and not a long distance from his home.

The Commissioner disallowed the claimed deduction. On taxpayers' petition for redetermination, the majority of the Tax Court concluded:

> "We have found as an ultimate fact, on this record, that the expenses at issue were directly related and pertained to his business—that of a Government attorney. It makes no difference that the petitioner was not required to maintain a home office, that he wanted merely to do a good job, and that he liked his work. The expenses were 'necessary' because they were appropriate and helpful in the conduct of his business. They enabled him to keep a facility in his home wherein he could, and did, work. See *Newi* v. *Commissioner*, [432 F.2d 998, C.A. 2, 1970]; *Blackmer* v. *Commissioner*, 70 F.2d 255 (C.A. 2, 1934). They were 'ordinary,' and not capital, in nature. See *Welch* v. *Helvering*, 290 U.S. 111 (1933); *Commissioner* v. *Tellier*, 383 U.S. 687 (1966). Accordingly, we hold that the home office expenses of this petitioner fall within section 162 and outside section 262."

The dissenting opinions took the position that the claimed deduction was a personal expense and not a business expense.

It is true that §162(a) of the Internal Revenue Code, 1954, provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." But §262 provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses." And, as the Supreme Court has recently pointed out, *Commissioner* v. *Idaho Power Co.*, —— U.S. ——, ——, 94 S. Ct. 2757, 2767 (1974), "Section 161 provides that deductions specified in Part VI of Subchapter B of the Income Tax Subtitle of the Code are subject to the exceptions provided in part IX'." Part

VI includes §162 and Part IX §262. The priority ordering directive of § 161 therefore requires, on the facts of this case, that the provision quoted from § 262 take precedence over the provision quoted from § 162(a).

T.R. (1954 Code), § 1.262-1(b)(3) provides:

> "Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense."

Bodzen did not use any part of his apartment as his place of business; like most lawyers and judges, he sometimes, by choice, did some of his reading and writing at home.

Newi v. *C. I. R.*, 432 F.2d 998, cited by the Tax Court, is distinguishable. Newi was an outside salesman of television time for the American Broadcasting Company; he used a study in his residence for an average of three hours a night, reviewing his notes on the day's selling activities, studying various research materials and ratings, making plans for the next day's work, and viewing the television advertisements of A.B.C. and its competing networks. The court noted that if Newi had returned to his office after dinner, he would have missed many of the programs which would have been of importance to him, and made clear that it was "deciding only as to the facts here presented." 432 F.2d at 1000.

Many Tax Court cases have been cited by taxpayers and the Commissioner. In those in which deduction was allowed the office provided by the employer was either not available in the evening and on weekends or was not suitable for the purposes for which the taxpayer involved was

using a room in his home. That is not true in the instant case.

We conclude that the expense of renting the Bodzin's apartment was a personal expense within the meaning of § 262 and not a business expense. It is, therefore, unnecessary to decide whether it was appropriate and helpful in carrying on his business. The deduction was properly disallowed by the Commissioner. The decision of the Tax Court is

REVERSED.

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deductions shall be allowed for personal, living or family expenses.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.162-1. *Business expenses.*

(a) *In General.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162. * * *

§ 1.262-1. *Personal, living and family expenses.*

(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * *

(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1322

STEPHEN A. BODZIN AND TANYA K. BODZIN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented is whether petitioner[1] may deduct a portion of the rent paid for his personal apartment residence under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.) because he used one of its rooms to perform employment-related tasks on some evenings and weekends. The court of appeals held that the expense of renting an apartment was a nondeductible personal expense under Section 262 of the Code and not a business expense.

Briefly, the pertinent facts are as follows: During 1967, petitioner was employed as an attorney-adviser in the Interpretative Division of the Office of the Chief Counsel for

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[1]"Petitioner" refers to Stephen A. Bodzin. Tanya K. Bodzin is a party because she filed a joint return with her husband.

the Internal Revenue Service, in Washington, D.C. In that capacity, he reviewed, analyzed, researched and wrote opinions concerning proposed ruling letters and published rulings, and dealt with requests from other divisions in the Chief Counsel's office for advice on various tax matters. Petitioner worked independently, without daily supervision, but was expected to complete his cases with reasonable promptness. He was not required, requested, expected or encouraged to work beyond normal business hours, but sometimes did so in order to meet deadlines, self-imposed or otherwise, and to insure that his work was performed to the best of his abilities (Pet. App. A 2a-4a; Pet. App. B 15a).

In 1967, petitioner, his wife and child lived in an apartment in Alexandria, Virginia. The apartment consisted of a living room, dining room, kitchen, two bedrooms and baths and a study or den. The study was furnished with a desk and chair, bookcases, cabinets, and lamps, and petitioner kept his personal papers, his stamp collection, and his and a portion of his wife's personal library there. Petitioner also kept his personally owned law books in the study. The study was not used to entertain visitors, but was occasionally used by petitioner for personal purposes, such as reconciling his bank statements, paying bills and maintaining his stamp collection (Pet. App. A 4a-5a; Pet. App. B 15a).

Petitioner usually worked in this study two or three evenings a week and for three to five hours on weekends. He worked on cases and other matters assigned to him and also read about current developments in tax law. Petitioner's employer provided him with an office in the Internal Revenue Service building which was always open and available to him. While this office was located only

ten miles from his house, petitioner almost invariably chose to do his overtime work in the apartment den. He worked there both because he found it more convenient and because he thought it was more efficient to work at home. Using the den enabled petitioner to spend more time with his family and to take advantage of his car pool (Pet. App. A 5a-6a; Pet. App. B 15a-16a).

In 1967, petitioner paid a total of $2,100 in rent for his apartment and deducted $100 of this amount as a business expense on his return for that year. On audit, the Commissioner disallowed petitioner's deduction of a portion of his rent as a business expense. In a reviewed decision with four dissents, the Tax Court upheld petitioner's claimed deduction on the ground that use of his den was appropriate and helpful to the performance of his duties as an attorney for the Internal Revenue Service (Pet. App. A 6a-10a).

The court of appeals, however, reversed. It concluded that the rental expense was a personal expense under Section 262 of the Code and not a business expense within Section 162(a). Because of its holding that the deduction was barred by Section 262, the court of appeals found it unnecessary to reach the question whether the expense could be classified as "ordinary and necessary" within the meaning of Section 162(a) (Pet. App. B 14a-18a).

1. Section 161 of the Code states that "[i]n computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible)." As this Court observed only last Term in *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17, this provision is a priority-ordering directive foreclosing the deduction of any expense specifically made nondeductible by Sections 261 through 279, even if such an

expense might otherwise fit within the terms of a section authorizing a deduction. Section 262 provides that "no deduction shall be allowed for personal, living, or family expenses." Thus, pursuant to Section 161, any expense which might be arguably deductible as a business expense under Section 162(a), would be nonetheless nondeductible if it were a "personal, living, or family" expense under Section 262.

The undisputed facts of this case demonstrate that petitioner's use of his home study arose solely out of personal considerations. As the court of appeals concluded (Pet. App. B 17a), petitioner performed after-hours work at home solely as a matter of personal choice. Petitioner found working at home more convenient because it permitted him to spend more time with his family and to make greater use of a car pool in commuting to and from work. The fact that petitioner's employer provided him with an office that was always available, that was located near his home, and that was unquestionably adequate for the performance of his overtime work, serves further to demonstrate that petitioner's use of his home study was prompted solely by personal considerations. See Rev. Rul. 62-180, 1962-2 Cum. Bull. 52, 56, *Example (4)*.

Since it is undisputed that petitioner did not use any part of his personal apartment residence as his place of business (Pet. App. B 17a), the court of appeals correctly concluded that his claimed rental deductions is barred by Section 262. See Treasury Regulations on Income Tax, § 1.262-1(b)(3) (26 C.F.R.).

2. Contrary to petitioner's contention (Pet. 5-6), the decision below does not conflict with *Newi* v. *Commissioner*,

432 F.2d 998 (C.A. 2).[2] There, the taxpayer was an outside salesman of television time for the American Broadcasting Company. He used a study in his apartment for an average of three hours each night to review his day's sales activities, study research materials and ratings, plan the following day's activities, and view the television advertisements on his employer's and its competitors' networks.

In allowing a deduction for the expenses allocable to the taxpayer's home study, the Second Circuit emphasized that viewing television programming was essential to the performance of his duties as a salesman and that the study was the most suitable place he could perform this aspect of his "business."[3] As that court observed with respect to the taxpayer's activities (432 F.2d at 1000), "It is his business to sell television programs in a competitive market. To do this he must endeavor to secure the maximum amount of television information available." Indeed, had the taxpayer in *Newi* attempted to travel to his employer-provided office in the evening, he would have missed much of the evening programming he was required to watch (see *ibid.*).

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[2]In an attempt to show that the Commissioner has been administratively inconsistent in his treatment of home study deductions, petitioner cites (Pet. 9) *Green* v. *Commissioner*, 59 T.C. 456. It is true the Commissioner permitted such a deduction in *Green*. However, the taxpayer in *Green* was a colleague of the taxpayer Newi, and performed the same duties as an outside salesman of television time. Since Green resided within the same appellate venue as Newi (59 T.C. at 457), the Commissioner's concession in *Green* was simply an acknowledgement of the applicability of the Second Circuit's ruling rather than an instance of administrative inconsistency.

[3]Petitioner also argues (Pet. 5-7) that the decision below conflicts with the Eighth Circuit's *per curiam* affirmance in *Dietrich* v. *Commissioner*, 503 F.2d 1379. However, petitioner has confused two different Tax Court cases involving the taxpayer Dietrich. The first case (30 T.C.M. 685) did involve a business expense deduction attributable to the use of Dietrich's home for business purposes, but that decision was not the subject of the appeal to the Eighth Circuit. The Eighth Circuit's *per curiam* affirmance involves only the second case (33 T.C.M. 66), in which the sole question concerned the taxation of a fellowship under Section 117 of the Code.

Thus, the decision in *Newi* turned on its particular facts and is distinguishable. There is no indication that the Second Circuit would uphold a deduction for a part of the rental of a personal apartment residence in this case, where the taxpayer's use of his home for after-hours work was prompted solely by personal considerations.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[4]Petitioner further urges (Pet. 6-8) that there is a conflict with various Tax Court decisions. But a conflict between the Tax Court and the decision below does not warrant resolution by this Court. At all events, the cited Tax Court decisions are not inconsistent with this case. In each of those cases, the employer-provided facilities were either unavailable or unsuitable for the overtime work in question (see Pet. App. B 17a-18a). Thus, the use of the taxpayers' houses for business purposes in those cases arose out of the "exigencies of business." *Commissioner* v. *Flowers*, 326 U.S. 465, 474.